United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1252

To be argued by RICHARD S. STOLKER

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

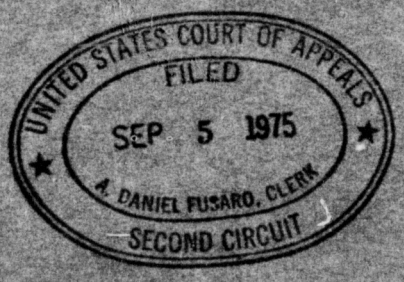
v.

JOSEPH DE SIMONE and LOUIS TONANI,

Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE



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ISSUES PRESENTED

1. Whether the trial court erred in restricting the scope of cross-examination of a government witness.

2. Whether the court erred in admitting allegedly prejudicial testimony.

3. Whether the court properly refused to dismiss the indictment as jurisdictionally defective where the Special Attorney who presented the case was properly authorized under 28 U.S.C. §515(a).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, appellant Joseph DeSimone was convicted of conspiracy to possess cocaine (a Schedule II controlled narcotic drug) with intent to distribute, in violation of 21 U.S.C. §846 (count 1); possession and distribution of cocaine with intent to distribute, in violation of 21 U.S.C. §841(a)(1) (count 2); and conspiracy to use extortionate means to attempt to collect or to collect an extension of credit (18 U.S.C. §894), in violation of 18 U.S.C. §371 (count 3). Appellant Louis Tonani was convicted with DeSimone of conspiracy (count 3) and was also convicted for using, on three occasions, extortionate means to collect or attempt to collect an extension of credit, in violation of 18 U.S.C. §894 (counts 4, 5, and 6). [1/] DeSimone was sentenced to concurrent seven year prison terms, with a special parole term on counts 1 and 2; Tonani was sentenced to concurrent six year prison terms (App. J. A. 3). [2/]

1/DeSimone was charged with Tonani in count 4, but the jury was unable to reach a verdict as to DeSimone on that count.

2/"App. J. A." refers to appellants' joint appendix.

At trial the government established that DeSimone, whom the witness Stephen Varga had known for about a year and who had helped Varga's girlfriend, Juanita Valdez, obtain employment as a barmaid, met with Varga and Valdez at the Franklin Arms Hotel (where Valdez worked) in February 1974, to discuss selling drugs (Tr. 28-33, 219, 341-343, 389-391). DeSimone offered Varga and Valdez a small quantity of cocaine, which Valdez, a narcotics user, sampled and reported was "top quality stuff and it should sell very easy" (Tr. 33-34, 173-176, 344-346, 394-396). DeSimone offered to provide Varga and Valdez with five ounces of cocaine for $5600-$6000 on consignment payable in 3-4 days, with profits to be split among the three; Varga and Valdez accepted the offer. Shortly thereafter DeSimone handed a brown paper bag containing cocaine to Valdez in her car (Tr. 34-37, 170, 177-185, 188, 217, 353-356, 396-402).

The responsibility for processing and distributing the cocaine rested on Valdez because of Varga's unfamiliarity with drugs (Tr. 36-37, 209-211, 356-358, 403). Either because Valdez encountered difficulty in making sales (as Varga testified, Tr. 37), or because the proceeds disappeared (as Valdez's testimony suggested, Tr. 410-419), Varga was unable to make timely payment for the cocaine. Late in February 1974, Varga and Valdez were present in her apartment

when a knock was heard at the door. Varga testified:

> So I untumbled the lock. The door flew open. They [DeSimone and an accomplice] pushed me into the room with guns in my stomach, two of them. [Tr. 39].
>
> * * * * * * * * * * *
>
> [DeSimone said,] "I'm going to give you three or four fucking days to get rid of this god damn shit. I ought to fucking kill you." . . . He says, "you get the whole god damn thing in within four days." [Tr. 41, 42.] [Cf. Tr. 365-368.]

Varga met with DeSimone about three days later and gave him $800-$1000 (Tr. 42-43). He paid additional sums on other occasions, giving DeSimone a total of $3800, some of which came from proceeds of cocaine sales by Valdez, and some of which Varga borrowed from his son (Tr. 44-46, 110).

In March, Varga and Valdez, having been threatened several times, left New York for South Carolina (Tr. 44, 137-140, 369). Varga obtained employment and remained there for about two months. Valdez flew back and forth to New York several times. Varga returned to New York for one week before Easter 1974, then returned to New York permanently in May 1974 (Tr. 140-145, 369-370).

On June 19, 1974, Varga arranged a meeting with Jimmy Van Utrecht to collect a debt (Tr. 45-46). Van Utrecht met him at the arranged place, accompanied by defendant Tonani and two other men (Tr. 46-47). Tonani ordered Varga into

Tonani's car. After he got in, two men in the front seat "jumped on their knees and shoved the guns in my face" saying, "'We got you, you son of a bitch. We've got you.'" Tonani also brandished a gun and said, "'We've got you, you son of a bitch, we got you at last,'" and gave Varga "a slight bang in the mouth" (Tr. 48-49, 267).

Varga was handcuffed on Tonani's order. Tonani announced that Varga owed ten thousand dollars, that the "coke you took was supposed to be mine." Tonani than struck Varga in the mouth again (Tr. 49-51). Varga was driven around in the car, handcuffed, for about seven hours. They stopped two or three times at a body shop and stopped twice at a gas station (Tr. 51-52, 57, 61). During the seven hours they were attempting to contact DeSimone and finally met him at a parking lot (Tr. 52-53). DeSimone came over to Varga, threatened him with a knife placed at his eyes, and said, "I ought to cut your fucking eyes out. I ought to cut your fucking legs off. I'm in all kinds of trouble. Where's the fucking money you owe me?" (Tr. 53-54).

DeSimone ordered Varga to turn over his car (which Varga had purchased new in South Carolina less than two months earlier, Tr. 249) as collateral. Varga signed over the registration and bill of sale, leaving the purchaser's name blank and entering the amount of $2500 as the sale price

(Tr. 55-56, 281).

A few days later, Varga contacted the F.B.I. and related the foregoing events. In return for his cooperation he was offered immunity from prosecution and relocation (Tr. 98-99, 242-243, 304, 314-315). With Varga's consent, the F.B.I. outfitted him with a device to record conversations with defendants.

On June 28, 1974, Varga saw DeSimone at his father's club. He offered to pay $50 and told DeSimone that he needed his car back. DeSimone stated, "You don't owe me any money. It's in other hands. I put it in other hands," but told Varga to handle everything with Tonani (Tr. 69-71, 116; Govt. Exh. 22). A tape of this conversation was played at trial in the jury's presence (Tr. 979), and a transcript of the tape was received in evidence (Govt. Exh. 22; Tr. 911, 937).

In a series of telephone conversations in early September 1974, Tonani demanded that Varga pay him the money he owed. After obtaining $100 from the F.B.I., Varga contacted Tonani, who sent a messenger for the money (Tr. 60-67). At trial a tape recording (Govt. Exh. 1) of those telephone conversations was played and transcripts of the conversations were supplied to the jury (Tr. 980-982; Govt. Exh. 23, 24, 25).

In a subsequent conversation (which Varga recorded) DeSimone said that $2000 was needed to "straighten this whole thing out." Varga asked DeSimone to get back the briefcase left in Varga's car because certain papers in the briefcase would help Varga raise the money (Tr. 74-76; Govt. Exh. 27). Varga reiterated that request in another conversation with DeSimone on November 3, 1974 (Tr. 81-83), which was recorded, transcribed, and played for the jury at trial (Govt. Exh. 11, 28; Tr. 983).

Varga met Tonani later on November 3, 1974 (Tr. 83; Govt. Exh. 28). Tonani advised that the amount owed was now $3000, and that if Varga did not make full payment by November 10, Tonani would destroy the car and its contents and have Varga and his family killed (Tr. 87; Govt. Exh. 28). When Varga did get his car back (after the defendants' arrests), it had been stripped and damaged (Tr. 89-90).

ARGUMENT

I. THE TRIAL COURT DID NOT UNDULY RESTRICT THE SCOPE OF CROSS-EXAMINATION OF GOVERNMENT WITNESS STEPHEN VARGA.

It is settled law that reasonable latitute must be afforded in cross-examining key government witnesses as to promises of immunity from prosecution. Alford v. United States, 282 U.S. 687 (1931), United States v. Lester, 248 F.2d 329, 334 (2nd Cir. 1957). As this Court stated in United States v. Haggett, 438 F.2d 396 (2nd Cir. 1971), cert. denied, 402 U.S. 946 (1971):

> Of course, there is no litmus test method to determine whether extrinsic evidence should be admitted to prove that a witness had a motive to testify falsely as to a particular matter, but a defendant should be afforded the opportunity to present facts which, if believed, could lead to the conclusion that a witness who has testified against him either favored the prosecution or was hostile to the defendant. United States v. Lester, supra, 284 F.2d at 334.

It is also settled law that the proper scope and bounds of cross-examination lie within the sound discretion of the trial court and absent an abuse of discretion, its rulings will not be disturbed on appeal. E.g., Glasser v. United States, 315 U.S. 60, 82-83 (1942).

As we show below, defendants in this case were afforded a reasonable opportunity to inquire into possible bias or motive on the part of Stephen Varga. Their cross-examination of Varga was lengthy and pervasive. The "restrictions" placed on counsel as to promises of immunity and relocation concerned matters of form rather than substance. The record reveals that the entire

extent of Varga's arrangements with the prosecution was laid before the jury:

[Cross-examination on behalf of defendant DeSimone]

Q. Is it true, sir that you have been living at government expense?

A. No, sir, not I.

Q. That the government set up a place for you to live?

A. No, sir. [Tr. 168]

* * * * *

Q. Originally when you first went to the FBI, when you first met with the prosecuting officials in this court, did they discuss with you the various crimes that you would be prosecuted for?

A. They told me that I won't be prosecuted on any of the actions that happened in this case.

Q. Only to do with this case.

A. Did they extend to you the promise of not prosecuting you for any crimes that you told them about --

MR. DOUGHERTY: I will object to the question.

THE COURT: Sustained. Do not answer it.

MR. HORLICK: I have a right to bring that out.

THE COURT: The objection has been sustained. If you want a side bar, I will give it to you.

MR. HORLICK: I would like a side bar.

(The following transpired at the side bar:)

MR. DOUGHERTY: Your Honor, I think his question suggests that this witness may be guilty of a crime. I think the question is objectionable.

MR. HORLICK: I have the right to bring out the deal that is made to show bias on behalf of this witness.

THE COURT: I agree with the prosecutor, there is a suggestion here that this witness is guilty of other crimes, and for that reason, the objection is sustained.

MR. DOUGHERTY: If I may suggest, he could ask what promises were made.

THE COURT: Yes, that is what you can ask.

MR. HORLICK: I will do it that way then.

(The following transpired in open court:)

BY MR. HORLICK:

Q. Mr. Varga, can you tell me what promises were made to you by any members of the prosecuting team, any United States Attorney or any FBI agent or any law enforcement agent, in return for your testimony -- what they promised to you?

A. Well, that I wouldn't be prosecuted in any action that I had given them.

Q. In other words, their promise to you was in return for your testimony, whatever crimes you told them about that you committed, you would not be prosecuted?

MR. DOUGHERTY: Objection.

THE COURT: Sustained. Do not ask him that. That is entirely a new area.

Come up again, gentlemen.

(The following transpired at the side bar:)

MR. DOUGHERTY: Your Honor, I may be dense, but the question suggested to me that in addition to his information with regard to this case -- The question suggests that if he divulged any other crimes, that he was given immunity for that. And I think that question is objectionable. And I think he ought to --

THE COURT: That is sustained.

MR. HORLICK: That was not my question. That was his answer.

THE COURT: You are putting the words into this witness' mouth. And that's the objection. And it's objected to and sustained. And you may not ask it.

Ask him. Ask him.

MR. HORLICK: My question to him --

THE COURT: But we don't want you to interpret --

MR. HORLICK: No, sir.

THE COURT: (continuing) -- what it is.

MR. HORLICK: Did I hear wrong?

THE COURT: You let him answer.

MR. HORLICK: When I asked him the question -- We decided at the side bar. He answered -- The way I heard it, they promised me that they won't prosecute me for any crimes that I --

MR. DOUGHERTY: Any actions.

MR. HORLICK: He said, "crimes." Can I have it reread? I don't mean to fight, Judge.

THE COURT: This is an area which you have brought up.

MR. HORLICK: Right.

THE COURT: New. And this is something which you are using for direct questioning of this witness. As so to that, the leading which you are doing is improper, and you cannot ask it as a direct question and cross-examine as to that question, too.

MR. HORLICK: No, sir.

THE COURT: That's what you are doing.

MR. HORLICK: Okay. Judge, I will try to ask the question as a direct examination question.

THE COURT: And that means you just ask, "What did you say, and what else was said."

MR. HORLICK: That's fair.

THE COURT: Rather than putting words in, which is cross-examination.

MR. HORLICK: That really wasn't what I was trying to do.

THE COURT: That's what you are doing. That's exactly what you are doing.

MR. HORLICK: I don't want to fight, Judge.

THE COURT: That's what you are doing.

MR. HORLICK: I am not going to do it.

THE COURT: You are opening up --

MR. HORLICK: I will ask him the conversation.

THE COURT: You are opening it up. So, therefore, you are limited.

MR. HORLICK: I understand.

THE COURT: You are limited to direct examination on this witness.

MR. HORLICK: Okay.

THE COURT: As to that area only.

MR. HORLICK: Right.

MR. DOUGHERTY: Thank you.

(End of side bar.)

Q. Mr. Varga, the conversations that you had with reference to the crimes that you would not be prosecuted for, who did you have them with?

A. With Virgil Young.

Q. When did you have those conversations?

A. When I went to them at that day.

Q. When you say that day, is that the first day that you appeared at their office?

A. Yes.

Q. Were you represented by an attorney or anyone else?

A. No. I went there by myself.

Q. Will you tell us the conversation that you had, including what you asked them, and what they told you, or what they may have asked, and you told them, with respect to -- only to the question of the crime or crimes that you might not be, or would not be prosecuted for?

A. When I went to them, I gave them a partial of -- or brief of what happened, because I wanted to know what happens to me if I relate the whole story to them.

Q. You say a partial or brief? You mean --

THE COURT: Let him tell it to you, counselor.

THE WITNESS: Well, partially of what happened. I told them about me being abducted, my car stolen, and my children threatened. And I didn't want to tell them any more because they asked me how did this come into the picture about this abduction, my car stolen, and the threats. So I told them there was a deal about -- with coke. And I didn't want to tell them any more unless they tell me what happens to me after I relate the whole story to them. So they told me there will be no charges pressed against me in this case. [Tr. 190-196.]

* * * * *

[Cross-examination on behalf of defendant Tonani]

Q. Mr. Varga, on June 24th, 1974, I believe it was June 24, 1974, you went to the FBI headquarters?

A. Yes.

Q. And related a tale concerning this incident; is that not right?

A. I related what happened.

Q. I am not trying to trick you, Mr. Varga. I hope you understand that. You told the FBI that you were a victim of some sort; is that right?

A. Yes, I did. [Tr. 241-242.]

* * * * *

Q. I'd like to know the substance of the conversation,

the promises, if any, which were given to you by the the FBI, in return for your testimony or story?

A. They offered me protection, if it came to a jury and a trial, they would change my name and my destination where I wanted to go, they would place me and give me a slight subsistance until I get on my feet.

Q. Are you collecting that slight subsistance at this time?

A. No, I don't receive any.

Q. You don't receive any subsistance from the FBI?

A. None whatsoever.

Q. The defendants in this case were arrested in November sometime, from November 1974 until you presence here the other day, Monday, I believe you came to testify, Tuesday, rather--you were not in New York?

A. No, I wasn't.

Q. You were somewhere that the agents placed you?

A. Where I always lived.

Q. All right. Did the FBI give you any money to help you along?

A. The FBI gave me no money or expenses while this investigation was going on. They gave me gas and toll monies and twice he bought me a sandwich.

Q. They bought you a sandwich, once or twice?

A. Twice.

Q. Didn't you just indicate thay they promised you a subsistance?

A. That's after the trial.

Q. Oh, after the trial?

A. Yes.

Q. So that when you leave here, you will receive a subsistance from the FBI until you got on your feet?

A. A temporary allowance until I get a job, they will

help me get a job or I obtain it myself. That would be temporary, you know. [Tr. 245-246.]

* * * * *

Q. Okay. So that the FBI has promised you some subsistance. You don't know the amount of it?

A. Yes.

Q. You do know the amount?

A. No, I don't know the amount.

Q. Oh, you don't know the amount?

A. No, not yet. [Tr. 248]

* * * * *

Q. Mr. Varga, did you not testify yesterday that after having a conversation with the agents and agreeing to cooperate with them, that they promised you a new life?

A. Not a new life, a relocation.

Q. A relocation?

A. Yes.

Q. Are you saying that you did not say "new life"?

A. I said with this relocation I will start a new life.

Q. A new life. [Tr. 304-305.]

* * * * *

[Redirect examination by the government]

Q. Did there come a time in November when you were picked up by Federal Marshals, you and your family?

A. Yes, November 6.

Q. And after having been picked up by the marshals were you and your family relocated?

A. My family was relocated.

Q. Following the relocation of your family did the marshals provide subsistence for your exwife and children?

A. Yes.

Q. So that when you testified yesterday and possibly on cross examination that you didn't get any subsistence, he did not mean to suggest that your family didn't get subsistence, is that right?

A. Yes.

Q. However, you yourself, did not get any subsistence?

A. I myself did not get any subsistence.

Q. In fact were you told that you were going to be getting subsistence?

A. Yes, after relocation. To that effect this is what I think was said to me.

Q. And since the time you were relocated you have not received separate subsistence?

A. I have not received anything from this, no. My family has.

Q. At the time your family was relocated did you leave any forwarding address?

A. With whom?

Q. With anyone.

A. Only with the FBI. And only that marshals knew where I lived.

Q. So that the relocation was designed to accomplish a complete break of any contact with Brooklyn between you and your family?

A. Yes, with my family and I took it upon myself to stay where I was. I felt safe. [Tr. 314-315.]

* * * * *

Q. Isn't it a fact Mr. Varga that last week you signed a release from the relocation program?

A. Yes.

Q. And at the time you signed the release did you know that you would be cut off from any and all subsistence that had been promised to you?

A. Yes. [Tr. 318.]

* * * * *

[Recross examination on behalf of defendant Tonani]

Q. So you feel good about the fact now that your family is being taken care of?

A. It is an ease off my mind, yes.

Q. Right, and the only way you were going to accomplish that was by cooperating with the Government?

MR. DOUGHERTY: Objection.

THE COURT: Sustained.

Q. Were you able to accomplish that end, to wit, taking care of your family, without cooperating with the FBI?

A. I always try to help my family as well as I can.

Q. As well as they are being taken care of now, would you have been able to do that for them had you not cooperated with the FBI?

A. I would have been able to do that if I lived all the time in the house, yes.

Q. But you could not live all the time in the house?

A. No. [Tr. 335-336.]

The right to cross-examine as to a witness's bias is not without limit. In United States v. Mahler, 363 F.2d 673 (2nd Cir. 1966), the trial court had permitted Einiger, a principal government witness, to testify on cross-examination (over the government's objection) that his lawyer had told him he could easily be sent to prison for his involvement in the crime, and that if he testified for the government he might receive some favorable consideration as to sentencing. The trial court disallowed further inquiry into this area. On appeal, this

Court held that the trial court had not abused its discretion, stating (363 F.2d at 677):

> Here, the advice to Einiger of his lawyer that he might receive consideration was allowed in evidence. We agree that complete preclusion of cross-examination as to motive for testifying is an abuse of discretion; but beyond that, the issue is whether defense counsel had an opportunity to bring out considerations relevant to motive or bias. Here, counsel was not prevented from adequately establishing such a motive, and the issue was fairly put to the jury in the court's charge. 3/

Here, the jury learned through cross-examination that the government had promised Varga, in exchange for his cooperation, immunity from prosecution as to any offenses he may have committed concerning this case. Any illegal acts Varga had committed in connection with this case were, of course, known to the jury through Varga's detailed recital of the events in which he was first a participant and later a victim. Defense counsel were allowed to elicit from Varga not only the described promise of immunity but also the fact that Varga's family had been relocated and Varga himself would be relocated in exchange for his testimony. Defense counsel, therefore, were accorded ample opportunity to present to the jury Varga's motives or bias in testifying. See United States v. Mahler, supra, 363 F.2d at 677. There is no indication in the record that Varga had committed or been charged

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3/In the case at bar the jury was instructed to consider the possible bias or interest of each witness in assessing his credibility (Tr. 1147), and the issue of Varga's motive for testifying was driven home in the closing arguments of counsel (e.g., Tr. 1021, 1032, 1044).

with offenses other than the instant cocaine offenses. Inquiry into hypothetical "other" offenses and a possible promise of immunity relative thereto would have elicited, at most, merely cumulative evidence of Varga's motives for testifying. Compare, United States v. Leonard, 494 F.2d 955, 962 and n.12 (D.C. Cir. 1974) (limitation on cross-examination excluding proof that a government witness, charged with felonies, was permitted to plea to a lesser offense and have the felony charges dismissed in exchange for his cooperation was reversible error when considered in conjunction with the clearly erroneous jury charge).

In sum, appellants have failed to demonstrate a clear abuse of discretion. On the contrary, the limitations imposed on the cross-examination of Varga were calculated to prevent excursions into matters unrelated either to the issues at trial or to Varga's credibility as a witness, and therefore were reasonable and appropriate.

II. THE COURT DID NOT ERR IN ADMITTING ALLEGEDLY PREJUDICIAL TESTIMONY.

1. Appellants contend that the court erred in admitting the testimony of John Esposito, which they argue was prejudicial and not satisfactorily linked as to date and time to the facts of this case. [4/] Esposito, the manager of an automotive paint shop, was personally acquainted with Tonani, whom he had known for about a year and who previously had worked part time in the paint shop (Tr. 626-628). He testified that he saw Tonani with his car in a paint oven at the shop. There were two others in the back seat of the car. One of the men, who Esposito believed was age "50 or more" (Tr. 643), was "bound in some way--handcuffed--he was leaning forward and the other person was watching him or something--keeping guard over him." Tonani stated that the apparent prisoner owed him some money arising out of "a coke deal or a drug deal or something" (Tr. 632). Tonani and the others remained in the shop for about 15-30 minutes. Before leaving, Tonani "borrowed" a set of Esposito's license plates (Tr. 629-633, 672-673).

4/Appellant Tonani states: "What John Esposito did was to introduce the words 'oven', 'gun' and 'handcuffs' into this trial" (Tonani Br. 12). "Guns" and "handcuffs" were, of course, testified to by the witness Varga, in corroboration of whose account of events Esposito testified. In context the term "paint oven" surely was not prejudicial. (CON'T)

While Esposito was unable to recall the date and time of this occurrence to a certainty, he was positive that it was a weekday in mid-June 1974, and that since all or most of his employees had left for the day, it must have been "late afternoon," "much later" than lunch time (Tr. 629, 676). That Esposito was unable to positively identify the hostage as Stephen Varga, or recall the date with precision, did not require the exclusion of his testimony, United States v. Roberts, 481 F.2d 892 (5th Cir. 1973); but related merely to his credibility, United States v. Morabette, 119 F.2d 986 (7th Cir. 1941).

By its nature, circumstantial evidence obliges the trier of fact to draw inferences. So long as the proffered evidence overcomes the threshold test of relevancy--i.e., that the evidence renders the desired inference more probable than it would be without the evidence [5/] --it is properly

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4/(Footnote Continued) . . . Esposito explained that "[t]he oven is part of the spr[ay]ing operation in my shop where the cars, after they have been sprayed with paint, go into the oven for the baking process," and that the infrared lamps used in that process had been disconnected on the day in question (Tr. 630-631). As thus explained, the term "oven" had no macabre implications to arouse the jury's passions.

5/McCormick on Evidence, §185 (1972); North American Philips Company v. Church, 375 F.2d 93 (2nd Cir. 1967); Rules 401-402, Fed. R. Evid.

admitted. The degree to which the jury must draw inferences from the evidence affects its weight, not its admissibility. United States v. Ravich, 421 F.2d 1196, 1203-1204 (2nd Cir. 1970), cert. denied, 400 U.S. 834 (1970).

Stephen Varga had testified that he had been abducted at 2:45 p.m. on Wednesday, June 19, 1974, and that he had been driven to a gas station and a "body shop" by Tonani and the others (Tr. 51, 147-148). Taking the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), the jury reasonably could infer that the events about which Esposito testified had occurred on June 19, 1974, sometime after 2:45 p.m., that Varga was the fiftyish hostage referred to, that he was Louis Tonani's prisoner, that he was being detained against his will, that Tonani's purpose in detaining him was to extract money owed on a drug transaction, and that the borrowed license plates were to be used on Varga's automobile. 6/

Where a possibility of prejudice may result from the admission of evidence, "[t]he trial judge must weigh the

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6/Esposito testified that the automobile Tonani was driving in September 1974 looked like a photograph of Stephen Varga's car (Govt. Exh. 10, Tr. 638-639), although at that time it had South Carolina plates. On November 3, 1974, however, Tonani told Varga that "[t]he car has New York plates on it" (Govt. Exh. 28, at p. 18).

probative value of the evidence against its tendency to create unfair prejudice and his determination will rarely be disturbed on appeal." United States v. Ravich, supra, 421 F.2d at 1203-1204. While Esposito's testimony alone did not prove to a certainty that Tonani's apparent captive was Stephen Varga or that the events about which he testified occurred on June 19, 1974, we submit that the trial court correctly determined that its probative value in corroborating the testimony of Varga clearly outweighed the possibility of prejudice.

2. Appellant Tonani also contends [7/] that the court erred in admitting testimony concerning his post-arrest statement to an F.B.I. agent that "If you let me out of here I can get you 200 kis [kilograms] of coke" (Tr. 856). The statement was admitted only after the court, having held (in the jury's absence) a full evidentiary hearing and having heard the arguments of counsel (Tr. 730-763, 798-852), con-

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7/While appellant DeSimone does not contend that the admission of Tonani's post-arrest statement violated his right to confrontation (see Bruton v. United States, 391 U.S. 123 (1968)), we note parenthetically that the Bruton rule does not apply here, since the admission did not clearly incriminate DeSimone; see United States ex rel. Nelson v. Follette, 430 F.2d 1055, 1057 (2nd Cir. 1970); cert. denied sub nom. Nelson v. Zelker, 401 U.S. 917 (1971). The trial court cautioned the jury that Tonani's admission was not admissible as against DeSimone, and should be considered as evidence against Tonani only (Tr. 870-871).

cluded that the post-arrest admission was voluntarily made.

Any prejudice that may have resulted from admitting the statement was outweighed by its probative value as to Tonani's motive and participation in the scheme. The statement was relevant to prove he was deeply involved in collecting a debt arising out of a narcotics transaction. See Jackson v. United States, 331 F.2d 816 (D.C. Cir. 1964). Evidence of a crime with which a defendant is not charged may be admitted if relevant to show his motive as to the crime for which he is on trial. United States v. Frascone, 299 F.2d 824 (2nd Cir. 1962), cert. denied, 370 U.S. 910 (1962); cf. United States v. Fench, 470 F.2d 1234 (D.C. Cir. 1972), cert. denied sub nom. Blackwell v. United States, 410 U.S. 909 (1973).

III. THE SPECIAL ATTORNEY WHO PRESENTED THE CASE WAS PROPERLY AUTHORIZED UNDER 28 U.S.C. §515(a), AND THE COURT'S REFUSAL TO DISMISS THE INDICTMENT AS JURISDICTIONALLY DEFECTIVE WAS PROPER.

Appellant's contention that the court should have dismissed the indictment because the Special Attorney who presented the case was not properly authorized, is foreclosed by this Court's thorough opinion in In Re Grand Jury Subpeona of Alphonse Persico, ____ F.2d ____ (No. 75-2030, decided June 19, 1975).[8/]

8/See also, United States v. Wrigley, ____ F.2d ____ (8th Cir., No. 75-1235, decided July 18, 1975); CON'T

In Persico, this Court dealt exhaustively with the federal government's coordinated reaction to the threat imposed by organized criminal activity, including the organization of the several "Strike Force" offices and their relationship vis-a-vis the local United States Attorney's offices and the Department of Justice. The Court concluded that Strike Force attorneys were appointed to "assist" the United States Attorneys within the meaning of 28 U.S.C. §543.

After setting out in detail the relevant legislative history of 28 U.S.C. §515(a), the Court concluded that:

> an officer or other full-time employee of the Department of Justice must be "specifically directed" to conduct grand jury proceedings if he is not a United States Attorney or an Assistant United States Attorney. We hold that such a specific direction to an attorney regularly employed on a full-time basis by the Department of Justice need not by embodied in a single written authorization, but may be implied from other writings, guidelines, practices and oral instructions transmitted through a chain of command within the Department. [Slip op. at 4178-4179.] 9/

8/(Footnote Continued) . . . Shushan v. United States, 117 F.2d 110, 114 (5th Cir. 1941), cert. denied, 313 U.S. 574, reh. denied, 314 U.S. 706 (1941); United States v. Denton, 307 F.2d 336, 338 (6th Cir. 1962), cert. denied, 371 U.S. 923 (1963); United States v. Hall, 145 F.2d 781, 785 (9th Cir. 1944), cert. denied, 324 U.S. 871 (1945).

9/The Eighth Circuit has held that Special Attorneys of the Department of Justice are empowered, under 28 (CON'T)

The Persico court concluded that Special Attorney Del Grosso was lawfully authorized to appear before the grand jury. The letter authorizing Special Attorney James W. Dougherty to appear before the grand jury in the instant case (Appendix A) was identical to Mr. Del Grosso's authorization letter in Persico, except that the Dougherty letter was signed by the Deputy Attorney General, Joseph T. Sneed, rather than by the Assistant Attorney General in charge of the Criminal Division. As the court recognized in Persico, slip op. at 4181-4182, authorization by either official is satisfactory.[10/] In any event, the Deputy Attorney General is empowered to exercise all the authority of the Attorney General unless such power must be exercised by the Attorney General personally. 28 C.F.R. §0.15(a).

9/(Footnote Continued) . . . U.S.C. §515(a), to conduct grand jury proceedings even absent a showing that a special reason exists to limit or supplant the local prosecutor's function. United States v. Wrigley, supra.

10/Accord, United States v. Agrusa, ____ F.2d ____ (8th Cir., No. 75-1196, decided July 18, 1975).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of conviction should be affirmed.

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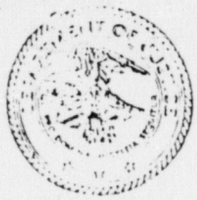
September 5, 1975



OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530
July 9, 1973

M'FILMED

Mr. James W. Dougherty
Criminal Division
Department of Justice
Washington, D. C.

Dear Mr. Dougherty:

The Department is informed that there have occurred and are occurring in the Eastern District of New York and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.

As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division.

Sincerely,

Joseph T. Sneed

JOSEPH T. SNEED
Deputy Attorney General

DOJ-1975-08

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v. NO. 75-1252

JOSEPH DE SIMONE AND LOUIS TONANI,

Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that the BRIEF FOR APPELLEE, with appendix, was served upon the appellants by mailing two copies thereof to their respective counsel at the following addresses:

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[Attorneys for Joseph DeSimone]

RUDOLPH E. GRECO, JR., ESQUIRE
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on September 4, 1975.

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